TWIN FABER SDN BHD v. NG CHENG KENG

COURT OF APPEAL, PUTRAJAYA
YAACOB MD SAM JCA
HADHARIAH SYED ISMAIL JCA
AZMAN ABDULLAH HC
[APPEAL NO: W-02(A)-1346-07-2021]
30 JUNE 2022

Abstract – *Costs is at the discretion of the court; the court has the power to direct a non-party to pay the costs of any suit, appeal or other proceedings, provided that the non-party has been warned, at the earliest opportunity, that costs would be sought personally against him.*

CIVIL PROCEDURE: *Costs – Indemnity basis – Winding up order against company – Costs on indemnity basis against non-party former manager of company – Whether directing mind of company – Whether warning given before application for costs filed – Whether order void and illegal – Whether against principle of natural justice*

The appellant commenced winding up proceedings against LKD Trading Sdn Bhd ('LKD') under ss. 465(1)(e) and 466(1)(a) of the Companies Act 2016 ('Act'). The respondent ('NCK'), a manager in LKD, affirmed four affidavits in opposition to the winding up petition on behalf of LKD and filed a notice of motion to strike out the winding up petition. However, on 8 September 2020, the day of the hearing of the winding up petition, NCK, who had resigned from the company on 7 August 2020, did not attend court. The court wound up LKD on 8 September 2020. The company winding up order contained, amongst others, order of costs on indemnity basis against NCK, to be paid personally by NCK. There was also a penal notice endorsed to the order, amongst others, to compel NCK to obey the order within time stipulated therein. Therefore, NCK filed an originating summons against the appellant contending that the order of costs on an indemnity basis against him, just because he had affirmed the affidavits on behalf of LKD, was void and illegal as it contravened s. 462 of the Act. NCK also contended that the order of costs was against the principle of natural justice as, *inter alia*, he was a non-party to the winding up proceedings and neither was he a shareholder or person having interest in LKD. NCK further contended that the penal notice was not part of the order granted by the High Court and it was inserted unilaterally by the appellant. The Judicial Commissioner set aside the order of costs against NCK in the companies' winding up order dated 8 September 2020. Hence, this appeal. The issues raised by the appellant were: (i) whether the companies' winding up court has the power to order costs against non-party; and (ii) whether the companies' winding up order dated 8 September was lawful.

Held (allowing appeal)
Per Hadhariah Syed Ismail JCA delivering the judgment of the court:

(1) NCK had not only affirmed an affidavit in opposition of the winding up petition on behalf of LKD, but he had also filed a notice of motion to strike out the winding up petition. He was, therefore, the directing mind of LKD since the two directors of LKD, as recorded in the Suruhanjaya Syarikat Malaysia, had lodged a police report stating they were not the directors of LKD. (para 30)

(2) Costs can be ordered against a non-party, provided warning was given in advance to the non-party that costs will be applied personally against him (*Takako Sakao v. Ng Pek Yuen & Anor (No 3)*). NCK had chosen not to attend court despite being duly informed by the appellant's solicitors, of the hearing of the winding up petition on 8 September 2020. The appellant had also warned NCK that they would apply for costs against him personally. Hence, NCK could not complaint that the order of costs against him was made by the court only upon hearing the appellant. The original court order dated 8 September 2020 against NCK to personally pay the costs was not a void or illegal order. The JC had thus erred in law in holding that the winding up court could not order costs against the respondent, a non-party, and in setting aside the order dated 8 September 2020 with respect to the costs. (paras 31-33)

Case(s) referred to:
Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(dist)***
Loke Kooi Chuan Properties Sdn Bhd v. Lee Kwee Foh Sdn Bhd [2013] 1 LNS 462 HC ***(refd)***
Takako Sakao v. Ng Pek Yuen & Anor (No 3) [2010] 1 CLJ 429 FC ***(foll)***
Tan Keen Keong v. Tan Eng Hong Holdings Sdn Bhd & Ors And Other Case [2015] 1 LNS 1385 HC ***(refd)***
Tan Keen Keong v. Tan Eng Hong Paper & Stationery Sdn Bhd & Ors And Other Appeals [2021] 2 CLJ 318 FC ***(refd)***
Wong See Nyam v. Lemo Sdn Bhd [1996] 1 CLJ 120 HC ***(refd)***

Legislation referred to:
Companies Act 2016, ss. 462, 465(1)(e), 466(1)(a), 468(2)

For the appellant - Alex Chang Huey Wah & Lim Wen Mi; M/s Alex Chang & Co
For the respondent - Kalearasu K Veloo & Shoba Murugiah; M/s Deidra Sharina & Co

[Editor's note: Appeal from High Court, Kuala Lumpur; Originating Summons No: WA-28PW-84-03-2021 (overruled).]

Reported by S Barathi

JUDGMENT

Hadhariah Syed Ismail JCA:

Introduction

[1] This is an appeal against the decision of the learned High Court Judge given on 16 June 2021, setting aside the previous company winding-up court order dated 8 September 2020 with respect to costs granted against the respondent, Ng Cheng Keng (NCK), a non-party in the winding-up petition.

[2] On 21 March 2022, we heard the submissons of both learned counsel for the appellant and the respondent and allowed the appeal unanimously.

Winding-Up Proceedings

[3] At the High Court of Kuala Lumpur, the appellant (Twin Faber) commenced a winding-up proceedings against LKD Trading Sdn Bhd (LKD) *via* Winding Up Petition No. WA-28 NCC-1257-11-2019 under ss. 465(1)(e) and 466(1)(a) of the Companies Act 2016.

[4] The respondent, Ng Cheng Keng (NCK) was a manager in LKD. He resigned from the company on 7 August 2020.

[5] In the winding-up proceedings, NCK had affirmed four affidavits in opposition of the winding-up petition on behalf of LKD. He also filed a notice of motion (encl. 7) to strike out the companies winding-up petition.

[6] It is not disputed that NCK did not attend court on the day the companies winding-up petition was heard on 8 September 2020.

[7] On 5 August 2020, Messrs Davis & Co discharged themselves from acting for LKD in the winding-up petition. Thus, LKD had no legal representation at the hearing of the winding-up petition on 8 September 2020.

[8] On 8 September 2020, the High Court wound-up LKD with *inter alia* the following orders:

> (1) That the said LKD Trading Sdn Bhd [Registration No. 199101007023 (217333-V)] to be wound up by the court order under the provisions of the Companies Act 2016;
>
> (2) That Dato' Lee Cher Chye (No. KP: 531103-10-5757) and Lim Tuck Cheong (No. KP: 581012-10-6389) be appointed as the joint Liquidators for the purpose of the said winding-up.
>
> (3) That the Petitioner be allowed the cost on an indemnity basis of RM75,000.00 to be paid by the Liquidators out of the assets of the respondent to the solicitors of the Petitioner within 14 days from the service of this order, failing which the said costs of RM75,000.00 to be paid by Ng Cheng Keng (NRIC No: 540226-10-5575) personally to the solicitors of the Petitioner within 30 days from the service of this order;

A (4) That the supporting creditors Cosode Resources, LNM Hardware Sdn Bhd, Sunwin Hardware Trading, M & J Iron Works Sdn Bhd, Odyssey O & G Sdn Bhd, LIWA Construction Sdn Bhd be allowed cost on an indemnity basis of RM12,000.00 to be paid by the Liquidators out of the assets of the respondent to the solicitors of the said supporting creditors within 14 days from the service of this order, failing which the said costs
B of RM12,000.00 to be paid by Ng Cheng Keng (NRIC No: 540226-10-5575) personally to the solicitors of the Petitioner within 30 days from the service of this order; and ...

[9] There was a penal notice endorsed in the said order which reads as follows:

C ENDORSEMENT

If you, the within-named Ng Cheng Keng (NRIC No. 540226-10-5575) neglects to obey this order by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same
D

Originating Summons

[10] On 22 March 2021, the respondent/NCK took out an Originating Summons No. WA-24NCC-136-03-2021 against the appellant at Kuala Lumpur High Court, seeking for the following orders:

E 1. Bahawa kebenaran diberikan kepada pemohon, Ng Cheng Keng (No. KP: 540226-10-5575) untuk memfailkan prosiding ini terhadap LKD Trading Sdn Bhd, responden kedua yang telah digulungkan menurut Perintah Penggulungan bertarikh 8.9.2020;

F 2. Bahawa satu perintah Penggantungan *Ex-Parte* dibenarkan terhadap perintah No. 3 dan 4 dalam Perintah Penggulungan bertarikh 8 September 2020 mengenai kos yang diperolehi oleh Responden Pertama, Twin Faber Sdn Bhd hanya terhadap pemohon, Ng Cheng Keng di Mahkamah Tinggi Kuala Lumpur menerusi tindakan Penggulungan Syarikat No: WA-28NCC-1257-11/2019 sehingga pelupusan Saman Pemula ini.

G 3. Bahawa satu perintah untuk mengenepikan dan membatalkan Perintah No. 3 dan 4 dalam Perintah Penggulungan bertarikh 8 September 2020 yang diperolehi oleh responden pertama, Twin Faber Sdn Bhd terhadap pemohon, Ng Cheng Keng menerusi tindakan Penggulungan Syarikat No: WA-28 NCC-1257-11/2019 untuk sejumlah RM87,000.00 bersama dengan fee allocator berjumlah RM3,480.00 disebabkan bertentangan
H dengan seksyen 462 Akta Syarikat 2016.

4. Bahawa satu perintah diberikan untuk mengenepikan dan membatalkan Notis Penal yang dimasukkan dalam Perintah Penggulungan bertarikh 8 September 2020 hanya terhadap Pemohon, Ng Cheng Keng;

I 5. Kos tindakan ini ditanggung oleh responden pertama; dan

6. Perintah lanjutan yang difikirkan wajar oleh mahkamah.

[11] The respondent/NCK contended that the order of costs on an indemnity basis made against him just because he had affirmed the affidavits on behalf of LKD is void and illegal as it contravenes s. 462 of the Companies Act 2016.

[12] The respondent also contended that the said order of costs is against the principle of natural justice on the following grounds:

(i) he is not a party in the winding-up proceedings;

(ii) he is not a director or shareholder or person having interest in LKD;

(iii) he affirmed the affidavits on the instruction of his superior officer without naming the officer;

(iv) he signed the affidavits on the instruction of LKD's directors;

(v) on the date of hearing of the winding-up petition on 8 September 2020, LKD had no legal representation. The court had wrongly made the order of costs against the respondent based on the submission of one party namely the solicitor for the appellant only;

(vi) he was only an employee who received salary and had no interest in LKD;

(vii) he has resigned from LKD on 7 August 2020. On the hearing date of the winding-up petition, he was no longer an employee of LKD; and

(viii) pursuant to s. 462 of the Companies Act 2016, costs of the winding-up proceedings have to be paid from the asset of the company.

[13] The respondent further contended that the penal notice is not part of the order granted by the High Court and it was inserted unilaterally by the appellant. The respondent was not given a right to be heard and raised objection on the same.

High Court's Decision

[14] Having heard the submissions by the respective parties, the learned Judicial Commissioner (JC) held as follows:

(i) There is a contravention of s. 462 of the Companies Act 2016 which only permits the court to make orders as to costs to be payable out of the assets of the company.

(ii) The fact that this court had given an opportunity for the applicant to be heard in the winding-up proceedings is irrelevant and cannot be relied upon to justify the impugned orders when the same is in conflict with a written law.

(iii) The applicant has proven to the satisfaction of the court that the impugned orders are null and void and this court therefore does not have the jurisdiction to grant the impugned orders.

A (iv) The applicant is entitled to collaterally attack the impugned orders.

(v) The impugned orders are thus a defect of a serious nature which needs to be set aside.

(vi) There was a breach of natural justice in granting the impugned orders.

B (vii) The procedural errors alleged by the first respondent's counsel are mere procedural defects which are not fatal and have caused no injustice to the first respondent more so when the facts of this matter before concerns a contravention of a written law and thus made without jurisdiction.

C (viii) It matters not whether the applicant had not named who had instructed him to affirm the affidavits in the winding-up proceedings as the issue herein in the OS is whether the impugned orders are in breach of a written law.

D **[15]** Based on the above findings and pursuant to the principle laid down by the Federal Court in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1989]1 MLJ 393, the learned JC allowed prayer 1, 3, 4 and 5 of the originating summons and set aside the order of costs against the respondent in the companies winding-up order dated 8 September 2020.

E **The issues**

[16] The two core issues raised in this appeal are as follows:

(i) whether the companies winding-up court had the power to order costs against a non-party; and

F (ii) whether the companies winding-up order dated 8 September 2020 was lawful.

As both issues are inter-related, they will be taken together.

G **The Appellant's Submission**

[17] Learned counsel for the appellant submitted that the learned JC had erred in law when His Lordship held:

(i) that the court had no powers to order costs against a non-party;

H (ii) that s. 462 of the Companies Act 2016 only permits the court to make orders as to costs to be payable out of the assets of the company; and

(iii) that the principle in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1989] 1 MLJ 393 is applicable.

I **[18]** Before us, learned counsel for the appellant submitted that costs is always at the discretion of the court and it has been the practice that the companies winding-up court has been ordering costs against a non-party. In

support of that proposition, learned counsel cited the following cases: *Wong See Nyam v. Lemo Sdn Bhd* [1996] 1 CLJ 120; *Takako Sakao v. Ng Pek Yuen & Anor (No 3)* [2010] 1 CLJ 429; *Tan Keen Keong v. Tan Eng Hong Holdings Sdn Bhd & Ors And Other Case* [2015] 1 LNS 1385; and *Loke Kooi Chuan Properties Sdn Bhd v. Lee Kwee Foh Sdn Bhd* [2013] 1 LNS 462.

[19] In *Wong See Nyam v. Lemo Sdn Bhd*, the receiver (Wong See Nyam) opposes the petition to wind-up Lemo Sdn Bhd (Lemo). The receiver is not a party to the winding-up petition. The High Court ordered Lemo to be wound-up. With regard to costs, Richard Talalla J held:

> As to costs which are always discretionary, I made an order for costs as prayed in the petition, such costs be limited to the costs of the proceedings in the winding-up as if unopposed and by reference to s. 220(1) of the Act. As to costs of the petitioning creditor relative to that part and extent of the proceedings opposed by the receiver, those costs were ordered to be taxed and paid by the receiver personally, and in this regard I had in mind that counsel for the respondent had informed me that the directors of the respondent Lemo could not be found and that at all times instructions relating to these proceedings had been taken from the receiver and not the directors.

[20] In *Takako Sakao*'s case, the Federal Court held that the appellant was a beneficiary under a constructive trust with the second respondent as trustee (the first judgment). When the trust property was sold off unilaterally by the second respondent, the Federal Court made an order in the form of specific relief (a mandatory injunction) to give effect to the first judgment. The second respondent applied to stay execution of the order made in both judgments. The Federal Court dismissed the stay application with costs of RM25,000. Learned counsel for the appellant moved the court to order that Dato' Chong Yuet Hwa, the deponent of the affidavit in support of the application for a stay be directed to pay the costs out of his own pocket.

[21] On the question whether it is permissible to order those costs be paid by Dato Chong Yuet Hwa, the Federal Court held "... it is now settled that a court has power to direct a non-party and for the present purposes Dato Chong is a non-party to pay the costs of any suit, appeal or other proceeding." However, in that case, the Federal Court did not order costs personally against Dato Chong because the appellant did not warn Dato Chong at the earliest opportunity that he may seek to apply for costs against him.

[22] In *Tan Keen Keong v. Tan Eng Hong Paper & Stationery Sdn Bhd & Ors And Other Appeals* [2021] 2 CLJ 318, the Federal Court affirmed the decision of the High Court in ordering cost personally against a non-party namely TCL together with the petitioner when the petition for companies winding-up was dismissed as TCL was the directing minds behind the petition.

[23] In *Loke Kooi Chuan*'s case, the defendant's company had applied to set aside an *ex parte* order extending the validity of a private caveat lodged by the plaintiff over the latter's property. It was discovered that the defendant's company had been dissolved in 1978 and no longer exist. The High Court dismissed the defendant's application and ordered the deponent of the affidavits on behalf the defendant (one Khoo Kian Wui) to personally pay costs of RM5,000 to the plaintiffs.

[24] Based on the above cited cases, the appellant submitted that the companies winding-up court had the necessary powers to order costs against a non-party. Therefore, it is submitted that the companies winding-up order dated 8 September 2020 ordering costs against NCK a non-party was not unlawful. It must therefore follow that the principles in *Badiaddin Mohd Mahidin* is not applicable to this case.

[25] With regard to the requirement that the appellant had to give warning to the respondent that the appellant would apply for cost against him personally, the appellant submitted that this requirement has been fulfilled *via* prayer 15.7 of the petition as well as *via* the two letters dated 10 August 2020 and 11 August 2020 respectively from Messrs Alex Chang & Co to the respondent.

[26] In relation to s. 462 of the Companies Act 2016, the appellant submitted that s. 462 governs voluntary winding-up. The case before the learned JC is winding-up by court and the applicable provision on costs is s. 468(2) of the Companies Act 2016. Therefore, it is submitted that the learned JC had erred in law in applying s. 462 in winding-up by court.

[27] Section 468(2) of the Act provides:

> The liquidator shall, reimburse the Petitioner out of the assets of the Company the taxed costs incurred by the Petitioner in any such proceedings unless the court orders otherwise.

[28] It is submitted that if the Companies Act 2016 limited costs to be ordered out of the assets only, then the companies winding-up court could never order any costs against the petitioners, liquidators or any other parties. It is submitted that the words "unless the court orders otherwise" in s. 468(2) allows the companies winding-up court to apply the principles in the Rules of Court 2012 to order costs against non-party in an appropriate circumstance as has been done in the above cited cases.

The Respondent's Submission

[29] Learned counsel for the respondent submitted that the learned JC was right in setting aside the companies winding-up order in relation to costs only as the order was seriously defective; contravenes ss. 462 and 468(2) of the Companies Act 2016. These provisions only allow costs to be paid out of the

assets of the company. Consequently, it is submitted that the companies winding-up order dated 8 September 2020 is null and void on ground of illegality or lack of jurisdiction.

Our Decision

[30] After a careful consideration of the facts and the law, we entirely agree with the appellant's submission. In this case, the respondent had not only affirmed an affidavit in opposition of the winding-up petition on behalf of LKD, but he had also filed a notice of motion to strike out the winding-up petition. He is, therefore, the directing mind of LKD since the two directors of LKD (as recorded in the Suruhanjaya Syarikat Malaysia) namely Abdul Jalal bin Kasnan and Muhamad Nasron bin Kasnan have lodged a police report stating they are not the directors of LKD.

[31] The respondent had chosen not to attend court despite the appellant's solicitors, Messrs Alex Chang & Co had duly informed the respondent of the hearing of the winding-up petition on 8 September 2020 *via* two letters dated 10 August 2020 and 11 August 2020. In the said letters, we find the appellant had warned the respondent that they will apply for costs against him personally. In the circumstances, the respondent cannot complaint that the order of costs against him was made by the court upon hearing the appellant only. The respondent only had himself to blame.

[32] The Federal Court decision in *Takako Sakao*'s case had established that costs can be ordered against a non-party provided warning was given in advance to the non-party that costs will be applied personally against him as in the case here. By the principle of *stare decisis*, the High Court is bound by *Takako Sakao*'s case. There is no need for the learned JC to give a narrow interpretation to s. 468(2) when the law is settled. When the court has power to order costs against a non-party, the original court order dated 8 September 2020 against the respondent to personally pay the costs is not a void or illegal order. It therefore follows that the principle in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1989] 1 MLJ 393 is not applicable in the present case.

[33] For the aforesaid reasons, we find the learned JC had erred in law when he held the winding-up court cannot order costs against the respondent, a non-party and in setting aside the order dated 8 September 2020 with respect to the costs. We therefore find there is merit in the appeal. Accordingly, we allow the appeal and set aside the decision of the High Court dated 16 June 2021. We award costs of RM10,000 here and below to the appellant subject to allocator.